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IN THE

Supreme Court of the United States

No. 546

OCTOBER TERM, 1957

IN RE: APPEAL OF JOSEPH RETENELLER

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

Motion to Dismiss Appeal

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MOTION TO DISMISS APPEAL

Appellee moves this Honorable Court to dismiss the appeal in the above entitled case on the grounds that there are no substantial federal questions involved.

STATEMENT

Appellant, Joseph Reteneller, is a former Philadelphia policeman. On March 26, 1954, he was dismissed from the police force by the Commissioner of Police, because it was found that he had accepted "pay-offs" from a numbers racketeer, who operated in the area which he patrolled.

After lengthy hearings before it, the Philadelphia Civil Service Commission, on February 1, 1955, upheld the action of the Police Commissioner in dismissing appellant from his post. Appellant then appealed the Commission's decision to the Court of Common Pleas No. 7 of Philadelphia

County. Among the errors alleged in the appeal to that Court, were the contentions on which appellant bases his present claim of denial of due process, namely, that he was precluded from adequate cross examination, that appellant's case was improperly consolidated with that of two other discharged policemen, and that the evidence against him was presented to the Civil Service Commission by an assistant district attorney rather than an assistant city solicitor.

On November 10, 1955, the Common Pleas Court reversed the decision of the Civil Service Commission disagreeing with the Commission on the merits of the case. However, since the Philadelphia Home Rule Charter appeared to limit judicial review in appeals from the Civil Service Commission to questions of procedure and jurisdiction, the City of Philadelphia appealed the decision of the Common Pleas Court to the Supreme Court of Pennsylvania. The appeal is docketed in that Court as *In re: Appeal of Joseph Reteneller*, January Term, 1956, No. 141.

Argument of that appeal before the Pennsylvania Supreme Court was postponed, by agreement of counsel, pending a decision by that Court of another matter known as the *Addison Case*. The *Addison Case* concerned the dismissal of another Philadelphia police officer for accepting 'favors' from the numbers bankers who made payments to Reteneller and directly raised the issue of the scope of review in appeals from the Philadelphia Civil Service Commission.

On April 16, 1956, the Pennsylvania Supreme Court decided the *Addison Case*, 385 Pa. 48, 122 A. 2d 272 (1956), holding that Section 7-201 of the Philadelphia Home Rule Charter restricts the scope of judicial review of Common

Pleas Courts in appeals from the Philadelphia Civil Service Commission to questions of jurisdiction and procedure.

On October 28, 1956, relying on the *Addison* decision, the City filed with the Pennsylvania Supreme Court in the matter at bar a Petition for Ruling Reversing the Order of the Court Below. This petition set out at length that from the standpoint of procedure and legal principles involved the *Addison* and *Reteneller* cases were parallel situations and that the Common Pleas Court's decision in the present appeal should be reversed on the basis of the *Addison* decision. A copy of the Petition was served on appellant's former counsel on October 31, 1956.

In the meantime, the present counsel for appellant appealed the *Addison Case* to this Court on the grounds that the scope of review afforded by the Philadelphia Home Rule Charter, as interpreted by *Addison*, violated due process and impaired the obligation of contracts. This Court, on January 14, 1957, dismissed the *Addison* appeal for want of substantial federal question: *In re: George E. Addison*, 352 U. S. 956 (1956).

Subsequently, the Pennsylvania Supreme Court issued a Rule to Show Cause why the City's aforementioned Petition for a Ruling Reversing the Order of the Court Below in the *Reteneller* appeal should not be granted. Service of this rule was accepted by former counsel for Reteneller, but no Answer was filed to the City's Petition. On February 5, 1957, the Pennsylvania Supreme Court made the Rule absolute, which constituted a reversal of the order of the Common Pleas Court and a reinstatement of the action of the Civil Service Commission in dismissing Reteneller.

Thereafter, on February 15, 1957, appellant's present counsel entered his appearance in the *Reteneller* case for

the first time and filed with the Pennsylvania Supreme Court a Petition to Reconsider and Vacate its order of February 5, 1957. This novel petition was, in effect, a request that the Pennsylvania Supreme Court change its decision and overrule the Civil Service Commission decision. In his Petition, appellant set forth in detail the alleged procedural errors before the Commission. The Pennsylvania Supreme Court then granted a Rule to Show Cause why this Petition should not be granted. The City filed an Answer contending at length that appellant's position, that prejudicial procedural errors had occurred before the Commission, was meritless. Appellant lodged an extensive Replication in which he reasserted the alleged procedural irregularities on which his appeal to this Court wholly depends.

On April 29, 1957, the Pennsylvania Supreme Court discharged the rule on appellant's Petition. This terminated the appeal in favor of the City of Philadelphia. It is from the Court's order discharging the rule that appellant seeks to appeal to this Court.

ARGUMENT

I. APPELLANT'S CONTENTION THAT THE INSTANT DECISION OF THE PENNSYLVANIA SUPREME COURT CONSTRUES THE PHILADELPHIA HOME RULE CHARTER AS BARRING JUDICIAL REVIEW OF PROCEDURAL ERRORS BEFORE THE PHILADELPHIA CIVIL SERVICE COMMISSION IS ERRONEOUS.

Appellant argues that the Pennsylvania Supreme Court in the matter at bar has decided that the Philadelphia Home Rule Charter does not allow judicial review of procedural deficiencies before the Civil Service Commission. This contention can only be based on the assumption that appellant did not obtain such review in the matter at hand, because it is perfectly clear that the orders of the Pennsylvania Supreme Court involved in this case at no place even suggest such a construction of the Home Rule Charter. To the contrary, as appellant notes in his Jurisdictional Statement and as the Pennsylvania Supreme Court ruled in the *Addison Case*, supra, Section 7-201 of the Charter expressly provides for judicial review of asserted procedural errors before the Civil Service Commission.[1]

There is no basis whatsoever for contending that the Pennsylvania courts in the matter at hand did not consider the questions of procedure which appellant raises

[1] Section 7-201 of the Philadelphia Home Rule Charter, which relates to appeals from the Civil Service Commission, provides in part: "Findings and decisions of the Commission and any action taken in conformance therewith as a result thereof shall be final and there shall be no further appeal on the merits, but there may be an appeal to the courts on jurisdictional or procedural grounds."

before this Court. These matters were determined adversely to appellant by both the Common Pleas Court and the state Supreme Court.

In his appeal to the Court of Common Pleas, appellant filed eleven exceptions to the adjudication of the Civil Service Commission. Exceptions numbered two, three and four set forth the procedural matters which appellant presses on this Court as the basis for assuming jurisdiction of his appeal. The Order of the Pennsylvania Common Pleas Court, dated October 17, 1955, reversing the Civil Service Commission (printed on page 26 of the Jurisdictional Statement) expressly sustained some of appellant's exceptions relating to procedure and, by failing to sustain the others, rejected them. This Order shows clearly that all of the appellant's exceptions were considered by the Common Pleas Court. None of the exceptions to the alleged procedural irregularities, which appellant asserts before this tribunal, were considered of sufficient merit to be sustained.

More importantly, however, there can be no question that the Pennsylvania Supreme Court itself considered appellant's contentions with respect to improper procedure before entering its final orders in this appeal. This is manifest from a consideration of what took place before the Pennsylvania Supreme Court.

Appellant's original counsel, who had represented him from the outset before the Civil Service Commission, declined to file an Answer to City's Petition for a Ruling Reversing the Order of the Court Below, presumably because he concluded that appellant had no meritorious defenses. Thereafter, the Pennsylvania Court, on February 5, 1957, entered what ordinarily would have been a final

order disposing of the appeal. Despite this action, the Pennsylvania Supreme Court accepted the Petition to Reconsider filed by appellant's newly retained counsel on February 15, 1957, and granted appellant a Rule on the City to Show Cause why the Petition should not be granted. The Petition of appellant, the Answer to it filed by the City of Philadelphia and the appellant's Replication were concerned solely with the validity of appellant's contentions with respect to procedural errors before the Commission. In addition, throughout the proceedings in the Pennsylvania Supreme Court that tribunal had before it the entire record of the matter since its inception before the Civil Service Commission. In view of the foregoing, it seems beyond question that the Order of the state Supreme Court dismissing appellant's Petition to Reconsider was an adverse adjudication on the procedural contentions which appellant now urges before this Court.

In view of the deliberate attention which the procedural questions received before the Common Pleas Court and the state Supreme Court, it cannot be sensibly argued that the Orders in question of the Pennsylvania appellate court construe the Philadelphia Home Rule Charter as denying judicial review of these matters in appeals from the Civil Service Commission. Such a construction of the Charter would have been directly contrary to its express language and to the recent, well-considered decision of the same court in the *Addison Case*, supra, where the right to judicial review of errors in procedure or jurisdiction was upheld. No intention to nullify the review provisions of the Charter and to overrule its decision in *Addison*, can be imputed to the Pennsylvania court by anything it has said or done in the appeal at bar.

II. No Substantial Federal Question Is Involved in the Present Appeal.

Appellant seeks to have this Court assume jurisdiction of his appeal on the basis of three procedural irregularities that allegedly occurred before the Philadelphia Civil Service Commission (Jurisdictional Statement, pages 5, 6, and 7). None of appellant's contentions with respect to the asserted procedural deficiencies has any merit nor presents a substantial federal question.

In the first instance, appellant contends that he was denied adequate opportunity to cross-examine the principal witnesses against him. It has been regularly ruled, even in criminal cases where the rights involved are most jealously protected, that the scope of cross-examination rests in the discretion of the trial court. *Glasser v. United States*, 315 U. S. 60 (1942); *United States v. Migliorino*, 238 F. 2d 7 (3rd Cir. 1956); *United States v. Stoehr*, 196 F. 2d 276 (3rd Cir., 1952), *cert. denied*, 344 U. S. 826 (1952). As was said in the *Migliorino* case, supra, on page 11 of the official report:

> "It is within the discretion of the trial court to control the permissible latitude of cross-examination. Its rulings will be disturbed only on a clear showing of abuse of that discretion."

The fact of the matter is in the case at bar is that both prosecution witnesses were subjected to a most thoroughgoing and vigorous cross-examination by one of Philadelphia's ablest attorneys. For example, Freeman Mitchell, the principal witness, gave direct testimony which covered

less than twenty-eight pages of the notes of testimony, while cross-examination of this witness covered one hundred fourteen pages. (Notes of Testimony before the Civil Service Commission pages 5 to 32, 32 to 145.) Similarly, the other prosecution witness whose direct testimony was covered in fourteen pages was cross-examined by appellant's counsel for over forty pages of the notes (Notes of Testimony before the Civil Service Commission, pages 156-169, 169-211). Under the circumstances, as an examination of the cited portions of the notes of testimony will bear out, appellant's counsel had abundant opportunity and complete latitude in the cross-examination of the witnesses appearing against his client.

Appellant suggests that he was prevented from cross-examining the principal prosecution witness on the question of being motivated to testify against Reteneller because of personal hostility. While the Commission, on page 92 of the notes of testimony before it, limited the scope of cross-examination on this point, it subsequently, at page 114, invited appellant's attorney to resume examination along this tack, but he declined to do so. This failure to take advantage of the opportunity offered by the Commission cannot now be converted into a basis for appeal. Any error was unquestionably waived.

In addition, it is clear from a recent decision of the Court of Appeals for the Third Circuit that where the hearing tribunal permits counsel to follow an avenue of cross-examination previously closed to him any error is cured. In *United States v. Migliorino*, 238 F. 2d 7, 11 (3rd Cir. 1956), a criminal case, the trial judge had upheld at one point an objection to a certain line of cross-examination.

However, counsel was granted other opportunities to ask the same question. The Court of Appeals held in language wholly applicable to the instant matter as follows:

> "On two separate occasions, then, the defense was allowed to inquire searchingly of the government's witness whether or not he testified in the hope of receiving a more favorable sentence. It follows that the fair trial requirements of *United States v. Hogan*, supra, have been amply satisfied."

The Civil Service Commission's invitation to Reteneller's attorney to resume the questioning that had been restricted earlier is clearly within the above ruling.

Furthermore, no prejudice of any sort can be shown in the instant matter by reason of interrupting the sequence of cross-examination since the matter was heard by an expert panel of Commissioners rather than a jury.

From the foregoing, it appears beyond dispute that appellant has no complaint with respect to the scope of cross-examination allowed before the Civil Service Commission. However, even assuming *arguendo* that error occurred in this regard, it was not sufficiently grave that it could be considered as depriving appellant of his constitutional right to a fair hearing.

Appellant also now seeks to assign error to the Commission because it consolidated the hearing involving Reteneller with that of two other police officers who had been discharged for accepting bribes from the same numbers banker. The reason for hearing the three cases together was that the same prosecution witnesses were to testify against the three dismissed policemen, who were each represented by the same defense counsel. At the time of the hear-

ing, the advantages of consolidation were discussed by counsel and the Commission, and appellant's attorney stated that he had no objection to the consolidation. (Notes of Testimony before the Civil Service Commission, page 4.) Certainly, that statement waived any right to object subsequently to the agreed upon procedure in handling the cases.

Even absent the agreement of appellant's counsel, no error can be based on the consolidation. The proceedings in question were not before a jury, but before an experienced hearing board capable of discriminating between the testimony offered against the three discharged officers. In fact, appellant stood to profit from the joinder of the hearings, because any discrediting of the credibility of the witnesses with respect to the other officers would have redounded to his favor.

A case involving a strikingly analogous objection to consolidation of hearings seems to dispose of appellant's contention. In *N. L. R. B. v. United Mine Workers*, 198 F. 2d 389, 390 (4th Cir. 1952), the Court of Appeals for the Fourth Circuit had before it a case where it was charged that the Labor Relations Board, a body similar in nature to the Civil Service Commission, had erred in consolidating hearings on charges against six different union locals for unfair labor practices that took place at different locations. In upholding the Board's action in considering the cases together, the Court of Appeals reiterated the well-settled rule that:

> "The joinder of proceedings was a matter resting in the sound discretion of the Board . . ."

Appellee submits in the instant matter that in addition

to a clear waiver of objection to the consolidation of the hearings, no prejudice was suffered by appellant as a result of the joinder.

The last point put forward by appellant as warranting the present appeal is so obviously a question of local law that it calls for scant attention. It is argued that a denial of due process occurred because an assistant district attorney rather than an assistant city solicitor conducted the major part of the examination of witnesses against appellant before the Civil Service Commission. Appellant's own Jurisdictional Statement, at pages 6 and 7, admits that the question is one governed by the Philadelphia Home Rule Charter. The question of the title of counsel who participated in the proceedings has no bearing on appellant's constitutional rights.

As a factual matter, the Philadelphia Charter only requires that the City Solicitor's office supervise the institution of a case before the Commission.[2] This was fulfilled completely in the matter at hand. The City Solicitor was at all times in charge of the case and an assistant city solicitor was present throughout the hearings. An assistant district attorney, who had investigated the improper relationship between the dismissed officers and the racketeer who had corrupted them, was chosen to handle the examination of witnesses because of his familiarity with the situation. The use of his informed assistance was in compliance with the Charter mandate directing cooperation between City departments in the interests of efficiency and economy.[3]

In conclusion, it seems safe to say that the choice of

[2] Philadelphia Home Rule Charter, section 7-302(1).

[3] Ibid., section 8-401.

counsel by the City of Philadelphia in the case at hand has no relationship whatsoever to appellant's constitutional rights or to any question of federal law.

CONCLUSION

For all of the foregoing reasons, it is urged that appellant's Jurisdictional Statement fails to raise any substantial federal questions or to demonstrate that his claims of procedural error have not received full and adequate judicial review. Accordingly, his appeal should be dismissed.

Respectfully submitted

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